

NOTICE OF ADOPTION

**LAW AND PUBLIC SAFETY
JUVENILE JUSTICE COMMISSION
DEPARTMENT OF CORRECTIONS
THE COMMISSIONER**

Transfer of Adjudicated Delinquents to the New Jersey Department of Corrections

Jointly Adopted Amendments: N.J.A.C. 13:91-1.1, 1.3, 1.4, 2.4, and 2.5

Jointly Adopted Repeal and New Rules: N.J.A.C. 13:91-2.1, 2.2, and 2.3

Jointly Adopted New Rule: N.J.A.C. 13:91-3

Proposed: August 19, 2013, at 45 N.J.R. 1941(a).

Adopted: July 16, 2014, by Executive Board of the Juvenile Justice Commission, by the Honorable John Jay Hoffman, Acting Attorney General and Chair, Deborah R. Edwards, Attorney General's Designee, and Gary M. Lanigan, Commissioner, Department of Corrections.

Filed: August 8, 2014, as R.2014 d.141, **with substantial and technical changes** not requiring additional public notice and comment (see N.J.A.C. 1:30-6.3).

Authority: N.J.S.A. 52:17B-170, 52:17B-171, and 52:17B-175.

Effective Date: September 2, 2014.

Expiration Date: May 15, 2015.

N.J.A.C. 13:91 is jointly adopted by the New Jersey Juvenile Justice Commission (the Commission) and the New Jersey Department of Corrections (DOC), setting out procedures for the transfer of certain juveniles from the Commission to DOC, as authorized by N.J.S.A. 52:17B-175(e). In *State of New Jersey In The Interest of J.J.* (427 N.J. Super. 541, App. Div. 2012), and as further clarified in an unreported decision, *State of New Jersey In The Interest of Y.C.* (Dkt No. A-1030-13) on June 5, 2014, the Superior Court of New Jersey, Appellate Division held that the chapter is constitutionally flawed because it fails to afford procedural due process to a juvenile proposed to be transferred. The adopted amendments, repeals, and new rules implement hearing procedures in satisfaction of the due process requirement, and make a number of minor stylistic changes.

Summary of Public Comments and Agency Responses:

The Commission received two public comments in response to the August 2013, notice of proposal: One from Office of the Public Defender, Appellate Section (the PD); the other from the Criminal and Youth Justice Clinic of Rutgers School of Law, Newark (Rutgers). The responses to the comments that follow reflect the views of both the Commission and DOC.

The Commission notes that in its comment, Rutgers inaccurately describes an important element of the holding in *JJ supra*. In summarizing the

standards applicable to transfers of juveniles to DOC, the *JJ* Court stated that “at a minimum” a juvenile subject to transfer must be offered the following five due process protections:

1. Written notice of the proposed transfer and of the supporting factual basis;
2. An impartial decision maker;
3. An opportunity to be heard and to present opposition;
4. Some form of representation; and
5. Written findings of fact supporting a decision to proceed with the transfer.

(See *JJ supra* at 557)

However, the Court did not say that the transfer rules found in N.J.A.C. 13:91 are constitutionally deficient in all five of these areas, as is claimed by Rutgers on page 2 of its October 18, 2013, comment letter.

1. COMMENT: The PD argues that the transfer hearings provided by new N.J.A.C. 13:91-3 should take place before the Family Part judge, rather than before a hearing officer, consistent with “... *the Family Part judge’s continuing jurisdiction over the juvenile disposition ...*” and with “... *the judge’s obligation to ensure the health, welfare and safety of the juvenile.*”

RESPONSE: The Commission disagrees. The amendments to N.J.A.C. 13:91 comply with the Appellate Division’s decision in *JJ*. In that decision, the Court **considered** and expressly rejected the argument that the transfer hearings be held before the Family Court rather than before a hearing officer. Specifically, the *JJ* Court held:

Inasmuch as the Family Part judge has already determined that a juvenile subject to transfer should be incarcerated in the first place, we see no need for a referral to the Family Part to approve a proposed transfer of custody to the DOC. Once the decision to incarcerate has been made, the decision with respect to the appropriate place for incarceration is within the authority and expertise of the JJC. N.J.S.A. 2A:4A-44(d)(1) (JJC “shall provide for the juvenile’s placement in a suitable juvenile facility.”). Consequently, that body should make the final decision, with the concurrence of the DOC commissioner as required by N.J.S.A. 52:17B-175(e), after conducting the required hearing directly or through a hearing officer. (*JJ, supra* at 557)

2. COMMENT: Rutgers claims that New Jersey’s statutory provision for administrative transfers of juveniles to DOC is unconstitutional because it does not provide for a trial by jury, essentially arguing that a transfer hearing amounts to an adult criminal proceeding.

RESPONSE: The Commission disagrees. This question was addressed at length by the *JJ* Court and was rejected. Citing favorably a Washington State Supreme Court case, the Court in *JJ* states:

We are persuaded by the Supreme Court of

Washington's reasoning in *Monroe v. Soliz*, 132 Wn.2d 414, 939 P.2d 205, 208 (1997), that a change in the place of confinement does not transform the essential nature of the judicial proceedings from juvenile to criminal:

Monroe's basic claim is that the administrative transfer of a juvenile from a detention facility to an adult prison alters the focus of the juvenile's incarceration, changing it from rehabilitative to punitive. Thus, Monroe argues, because he would be punished if housed in the adult prison, the law affords him a right to a jury trial. We believe this overstates the nature of the administrative transfer. At the heart of the issue is whether the place of a person's confinement defines the nature of the proceeding. RCW 13.40.280 does not, and cannot, substantively convert a juvenile proceeding to a criminal one. The basis for the juvenile's custody has not changed. The statute merely permits the State to change the place of confinement based upon an administrative determination that the juvenile "presents a continuing and serious threat to the safety of others in the institution." RCW 13.40.280(2).

The court rejected Monroe's jury-trial argument, finding that Washington's constitution, like New Jersey's, "has not been construed to guarantee the right of trial by jury in juvenile proceedings, and this proceeding remains juvenile in form and substance regardless of the site of incarceration." *JJ, supra*, at 554

The *JJ* Court later concludes:

Because the ... [Code of Juvenile Justice] ... which has both rehabilitative and penal aspects, provides extensive procedural protections to juveniles and significantly reduces their exposures to incarceration, in addition to offering a number of alternative dispositions, we conclude that a transfer to an adult facility based upon a finding that the juvenile's "continued presence in the juvenile facility threatens the public safety, the safety of juvenile offenders, or the ability of the commission to operate the program in the manner intended" does not, in the words of the Supreme Court of Louisiana, "upset the quid pro quo

under which the juvenile system must operate." C.B., supra, 708 So. 2d at 400.

Consequently, we conclude that the statute authorizing the transfer of custody "consistent with applicable state and federal standards," N.J.S.A. 52:17B-175(e), does not impinge on Jones' right to trial by jury. JJ, supra, at 555-556.

3. COMMENT: The PD objects to a transfer hearing being heard before an impartial decision-maker (hearing officer), arguing that such hearings should be heard by "a neutral and independent hearing officer." Similarly, Rutgers argues that an "impartial" decision-maker fails to afford the required level of due process, and that an independent decision maker is required, relying primarily on *Vitek v. Jones*, 445 U.S. 480 (1980), in which the Supreme Court held that an independent decision-maker was required in a case involving the transfer of an adult inmate to a mental institution.

RESPONSE: The Commission disagrees. The *JJ* decision expressly allows the use of an impartial decision-maker, a term which clearly encompasses Commission hearing officers. The *JJ* Court held that though there must be procedural due process sufficient to protect the juvenile's interests, it expressly rejected *Vitek* as a precedent for requiring an independent decision maker at a transfer hearing. In support of permitting an impartial decision maker, the Court said:

Although the full level of due process required by *Vitek* may not be appropriate, the rehabilitative purposes of the juvenile justice system combined with the importance of the decision in terms of the availability of rehabilitative services to juveniles at issue require due process at least as extensive as that required for prison discipline. See *Avant v. Clifford*, 67 N.J. 496, 525 (1975) ... [which requires] ... written notice of the proposed transfer and the supporting factual basis, **an impartial decision maker**, an opportunity to be heard and to present opposition, some form of representation, and written findings of fact supporting a decision to proceed with the transfer. (Emphasis added) *Id.*, at 557

Furthermore, the requirement of an impartial-decision-maker "... prohibits only those officials who have a direct personal or otherwise substantial involvement, such as major participation in a judgment or decision-making role, in the circumstances underlying the ..." transfer. *Meyers v. Alldredge*, 492 F.2d 296, 306 (3rd Cir. 1974). Commission hearing officers do not fall within this prohibition.

Notwithstanding its disagreement, the Commission has changed the definition of hearing officer in N.J.A.C. 13:91-1.3, so that it is now defined as "... an impartial hearing officer designated by the [New Jersey] Attorney General or

designee,” rather than a “staff member of the Commission.” The Commission believes that this will better ensure the impartiality that the Commission believes is already maintained by Commission hearing officers. As part of this change, the Commission is also adding a definition of “Attorney General” to mean “the Attorney General of the State of New Jersey.” This change raises to the Department level the authority to designate a hearing officer. It neither enlarges nor curtails who and what will be affected by the rule, alter what is being prescribed or proscribed by the rule, nor does it enlarge or curtail the scope of the proposed rule and its burden on those affected by it.

4. COMMENT: As proposed, the rules make a distinction between juveniles age 21 or over from those below age 21, granting a right of transfer hearing only to the latter. The PD objects, stating that there “simply is no reason” to support this distinction.

RESPONSE: The Commission agrees, and is not adopting N.J.A.C. 13:91-2.1(a) (pertaining to a juvenile over the age of 21) and is changing subsection (b) to delete the maximum age cap of 21, thereby, granting a right of transfer hearing to all juveniles.

5. COMMENT: N.J.A.C. 13:91-3.7 provides that the Commission’s Ombudsman will represent a juvenile at a transfer hearing. Both Rutgers and the PD object to this provision, claiming that representation by an attorney is necessary.

Rutgers claims that as a Commission employee, the Ombudsman “... faces an irresolvable conflict ...” that makes his representation ineffective, a claim echoed by the PD, which states that the Ombudsman cannot offer a juvenile the “... required zealous and independent allegiance ...” in his representation. The PD makes the additional claim that unlike disciplinary hearings, transfer hearings are “... on a par with the ‘critical’ probable cause hearing pertaining to waiver of juveniles to adult court ...” and require representation by an attorney.

RESPONSE: The Commission disagrees. The job of the Ombudsman is to represent the interests of juveniles and to intercede on their behalf. The Commission’s central mission is to effect successful re-entry of juveniles under its care into the larger society. As part of carrying out this mission the Commission provides multiple means for juveniles to seek redress of grievances, central to which is the role of the Ombudsman. The Ombudsman’s job is to represent his “clients”; it is not a conflict of interest.

Finally, the PD’s view that transfer hearings are “... on a par with the ‘critical’ probable cause hearing pertaining to waiver of juveniles to adult court ...” is a position that was squarely rejected by the *JJ* Court, which said:

We are persuaded by the Supreme Court of Washington’s reasoning in *Monroe v. Soliz*, 132 Wn.2d 414, 939 P.2d 205, 208 (1997), that a change in the place of confinement does not transform the essential nature of the judicial proceedings from juvenile to criminal ... [and where the] ... court

determined that juveniles were not entitled to a judicial hearing to approve the transfer, such as that required for a waiver to adult court.” Id at 554, 555.

Notwithstanding its disagreement, the Commission has determined that it would be in the interests of all parties to a transfer hearing to provide the juvenile with an option, exercisable within 48 hours of being served with a notice of transfer, to use retained counsel of the juvenile’s choice and at the juvenile’s expense. The juvenile only needs to advise the Commission that he or she will exercise the option of choosing either a private attorney or the Ombudsman, within the 48 hours. This will be most relevant in situations where a juvenile proposed for transfer already has counsel. If the option for private counsel is not exercised, the default remains the Ombudsman.

Accordingly, the Commission has changed N.J.A.C. 13:91-3.7, has added a new definition for “juvenile’s representative” to N.J.A.C. 13:91-1.3, and has made minor contextual adjustments to accommodate the possibility of private counsel.

Related to this, and to the designation of hearing officers by the Attorney General or designee, the Commission has changed N.J.A.C. 13:91-3.7 to provide for interested party statements to be submitted directly to the hearing officer, rather than through the Ombudsman.

These changes expand the identity of possible juvenile representatives at due process hearings to include retained counsel, and provide that interested party statements go directly to the hearing officer, rather than through the Ombudsman. They neither enlarge nor curtail who and what will be affected by the rule, alter what is being prescribed or proscribed by the rule, nor do they enlarge or curtail the scope of the proposed rule and its burden on those affected by it.

6. COMMENT: N.J.A.C. 13:91-3.12(c), as proposed, provides that where a juvenile has committed an assault serious enough to have been referred to a law enforcement agency there would be a presumption that the juvenile’s transfer is appropriate, and the juvenile would be required to show why the transfer should not occur. The PD objects to this provision for a number of reasons.

RESPONSE: The Commission believes that the provision exceeds the statutory authority for transfers, and it has been deleted it from the rule.

By addressing the status of a single charged violation, proposed N.J.A.C. 13:91-3.12(c) fails to focus on issues related to the continued presence of the juvenile in Commission facilities, as is the focus of the transfer standards set out in N.J.S.A. 52:17B-175.

7. COMMENT: Rutgers objects to two of the three transfer criteria set forth in N.J.A.C. 13:91-2.1(a) (which was N.J.A.C. 13:91-2.1(b) in the August 19, 2013, notice of proposed amendments and new rules), alleging that they are “overly broad” and violate applicable statutory authority. The two provisions in question are N.J.A.C. 13:91-2.1(a)2 and 3.

Rutgers alleges that these provisions “blatantly” exceed the statutory

standard set forth in N.J.S.A. 52:17B-175.e and that are *ultra vires*.

RESPONSE: This comment does not address the amendments and new rules adopted in this rulemaking. Rather, it challenges provisions of N.J.A.C. 13:91 that have been in the rule since originally adopted nearly 17 years ago. See 29 N.J.R. 3733(b). Therefore, this comment is beyond the scope of this rulemaking.

8. COMMENT: The PD objects to the provisions of N.J.A.C. 13:91-3.9, which provide for *in absentia* hearings, characterizing the provision as a “mechanism” for a juvenile’s “uncounseled voluntary absence” from a transfer hearing. The PD argues that legal representation is required, citing as support case law that goes to issues of representation at the critical stages of a criminal proceedings.

RESPONSE: The Commission disagrees. The PD’s reliance on procedural protections that attach to a criminal defendant is misplaced. As explained in response to prior comments, the *JJ* Court carefully and thoughtfully distinguished transfer hearings from judicial proceedings, stating clearly that the applicable standard in transfer hearings is due process “**at least as extensive as** that required for prison discipline.” (*Id* at 557) (Emphasis added). In addition, N.J.A.C. 13:91-3.2(a) requires that a juvenile be represented at an *in absentia* hearing.

N.J.A.C. 13:91-3.9 is a balanced provision for *in absentia* hearings. It recognizes both that a juvenile cannot be physically forced to attend a hearing, and that a juvenile’s refusal to attend cannot be a “mechanism” for stopping an otherwise valid transfer procedure. Furthermore, the rule establishes procedures to ensure that when waiving the right to attend the hearing a juvenile is aware that he or she in fact has a right to attend a transfer hearing, a right expressly provided in N.J.A.C. 13:91-3.8.

9. COMMENT: The PD objects to the provisions of the rule that permit for the voluntary transfer of a juvenile, if he or she is otherwise found to have met the standards for transfer. The PD charges that a voluntary transfer without a hearing cannot be made by an incarcerated juvenile without at least consultation with counsel, analogizing the juvenile’s request for a transfer to the waiving of *Miranda* rights.

RESPONSE: The Commission disagrees. There are many valid reasons why an older juvenile might wish to be transferred to the Department of Corrections, and elimination of this provision would not be in the best interests of those juveniles.

10.COMMENT: Both the PD and Rutgers state that the 48 hour time provided in N.J.A.C. 13:91-3.3(a) within which a juvenile must prepare objections to a transfer, and the three days from service of notice of transfer within which a hearing is to be held under N.J.A.C. 13:91-3.5(b), are too short.

RESPONSE: The Commission is not convinced that the that the proposed timeframes are too short, nonetheless, the Commission has doubled the time provided for a juvenile to prepare objections to a transfer, from 48 hours to 96, and has doubled from three days to six the period from service of the notice of transfer within which a transfer hearing is to be held.

11.COMMENT: Under N.J.A.C. 13:91-3.10(a), a juvenile may call witnesses in support of his or her challenge to a proposed transfer, unless the hearing officer determines that permitting witnesses would be a “threat to the safety of either the juvenile, other juveniles, staff, or to the orderly and safe operation of the facility.” Rutgers objects to the “threat to safety” standard as insufficiently severe. Rutgers contrasts this standard to “unduly hazardous” standard found in N.J.A.C. 10A:4-9.13, a provision governing witnesses called at DOC disciplinary hearings. RESPONSE: The Commission disagrees. The Commission notes that Rutgers inaccurately describes the scope of the standard set out in N.J.A.C. 10A:4-9.13(a)1. Rutgers states that it covers witnesses who’s being called to testify may be unduly hazardous “to people.” However, the relevant language in N.J.A.C. 10A:4-9.13(a)1 is significantly more expansive, reading unduly hazardous to “... the correctional facility/unit safety, security, orderly operation or goals ...”

The standard “threat to the safety of either the juvenile, other juveniles, staff, or to the orderly and safe operation of the facility” used in N.J.A.C. 13:91-3.10(a) provides no less protection to juveniles than does “unduly hazardous.” It is a commonly used correctional standard which is fully capable of being applied reasonably and fairly.

12.COMMENT: Under N.J.A.C. 13:91-3.10(c), the hearing officer has the discretion to refuse to call a witness who may create a “risk of reprisal.” Rutgers objects to the “reprisal” standard as being undefined and too vague.

RESPONSE: The Commission disagrees. The “reprisal” standard has long been used in the N.J.A.C. 13:101-6.12(a) without controversy. The Commission believes that it is no more difficult to apply reasonably and fairly than is the “unduly hazardous” standard favored by Rutgers (as reference in Comment 11 above).

13.COMMENT: Rutgers objects to the substantial evidence standard applicable to transfer hearings under the provisions of N.J.A.C. 13:91-3.12(a), arguing that instead the rule apply the standard “clear and convincing evidence,” and citing as support, cases applying that standard to involuntary commitment and deportation proceedings.

RESPONSE: The Commission disagrees. By comparing transfer hearings to involuntary commitment and deportation proceedings, Rutgers “... overstates the nature of the administrative transfer...” (*Monroe v. Soliz*, 132 Wn.2d 414, 939 P.2d 205, 208 (1997), quoted in *JJ* at 554). A transfer hearing fundamentally is about the juvenile’s place of confinement. It is an administrative proceeding, and the Commission believes the substantial evidence standard is appropriate.

14.COMMENT: Rutgers comments that the rule is deficient in that it fails to provide for “necessary pre-hearing discovery ...” citing WAC 388-745-020, *Notification to Juvenile*, a Washington State administrative regulation in support of its position.

RESPONSE: The Commission disagrees. As is true in disciplinary proceedings within a correctional facility, the maintenance of security, gang and other organized resident activity, the use of confidential sources and very real issues of intimidation and violence make it inappropriate to grant discovery, as that concept is generally understood in the judicial context. The Commission is mindful that among the most important obligations it has is the obligation to guard the safety of all juveniles under its care and to protect them from harm.

With respect to the cited Washington regulation, the Commission makes two observations.

That regulation reads in full:

A juvenile being considered for transfer to DOC shall be notified in writing at least five days in advance of the review board hearing convened to consider the matter. Notification to the juvenile offender will include the reasons the transfer is being considered and a copy of the rules pertaining to the review board hearing. Prior to any review board hearing, the juvenile being considered for transfer to DOC, or the juvenile's attorney, shall have the right of access to, and adequate opportunity to examine any files or records of the department pertaining to the proposed transfer of the juvenile to the department of corrections.

First, without having information about the population involved, the nature of the sending and receiving facilities, and the extent to which security sensitive information is redacted from inspected records, it is not possible to judge the relevance of a regulation such as this one way or another. Second, as a matter of course the juvenile's representative will insure that the Commission's basis for moving forward is revealed in a way that allows for meaningful presentation of a juvenile's case.

15.COMMENT: Rutgers claims that the rule fails to provide to for adequate written findings of the results of the transfer hearing.

RESPONSE: The Commission agrees. The Commission has changed the provisions of N.J.A.C. 13:91-3.12 and 3.13, to revise the heading of the section to clearly indicate the hearing officer is making a recommendation, to require a comprehensive and detailed hearing record, and to also require a written Executive Director determination supporting any proposed transfer. At the conclusion of the hearing, the hearing officer must prepare written findings and a recommendation as to whether the proposed transfer should proceed, and any recommendation to proceed with a transfer must be accompanied by comprehensive and detailed findings, supported by substantial credible evidence that one or more of the threshold standards set forth in N.J.A.C. 13:91-2.1(c) have been satisfied.

Within 48 hours after the hearing has been completed, the hearing officer must submit his or her recommendation and findings, including the Transfer

Hearing Form, Form 102, to the Executive Director, who, within another 48 hours, must issue a written determination whether the juvenile shall be referred for transfer to the Department of Corrections, which determination shall constitute final agency action.

These changes formalize the requirements for and the nature of hearing records. They neither enlarge nor curtail who and what will be affected by the rule, alter what is being prescribed or proscribed by the rule, nor do they enlarge or curtail the scope of the proposed rule and its burden on those affected by it.

16.COMMENT: Rutgers objects to N.J.A.C. 13:91-3.3(b). Rutgers claims that juveniles so referred will be denied appeal and related rights granted to juveniles held in the Behavior Accountability Unit (BAU) under the provisions of N.J.A.C. 13:95-7.

RESPONSE: The Commission disagrees. Upon referred to the BAU, juveniles subject to transfer have the same rights that are extended to any juvenile referred to the BAU.

17.COMMENT: Rutgers objects to the failure of the chapter to provide for “an audio or manually-transcribed record” of the transfer hearing.

RESPONSE: The Commission disagrees. Neither audio nor manual transcriptions are required by the *JJ* decision, and they are not normative in the context of internal prison administrative hearings.

18. COMMENT: Rutgers alleges that the Commission fails to comply with State and Federal requirements to provide for the collection and analysis of data “regarding the juvenile justice system to ensure the continuing review and evaluation of services, policies, and procedures.”

RESPONSE: The Commission disagrees. The Commission has developed and updates continually a comprehensive Juvenile Information Management System (JIMS) that meets and exceeds all applicable standards.

Summary of Agency-initiated Changes:

At proposed new N.J.A.C. 13:91-3.3(a), the Commission proposed a cross-reference to N.J.A.C. 13:91-2.2(f). N.J.A.C. 13:91-2.2 was proposed for repeal and replaced with a new section that was reorganized and restructured and the cross-reference should have been to N.J.A.C. 13:91-2.2(c) (which contains the identical language as N.J.A.C. 13:91-2.2(f)) and is corrected upon adoption. Further, upon adoption N.J.A.C. 13:91-2.1(c) is recodified as N.J.A.C. 13:91-2.1(b). The cross-reference at N.J.A.C. 13:91-3.12(a)1 is updated to reflect that change upon adoption.

Federal Standards Statement

The repeals and adopted amendments and new rules comply with 28 CFR 31.303 and do not exceed the standards or requirements imposed by this Federal law.

Full text of the adopted amendments and new rules follows (additions to proposal indicated in boldface with asterisks ***thus***; deletions from proposal indicated in brackets with asterisks ***[thus]***):

13:91-1.3 Definitions

The following words and terms when used in this chapter shall have the following meanings unless the context clearly indicates otherwise.

“Attorney General” means the Attorney General of the State of New Jersey.

...

“Hearing officer” means ***[a staff member of the Commission]* ***an impartial hearing officer*** designated ***by the Attorney General or designee*** to hear requests for transfers of juveniles from the care and custody of the Commission to DOC under the provisions of N.J.A.C. 13:91-3, Transfer Hearing.**

...

“Juvenile’s representative” means either the Ombudsman or private counsel selected, retained, and paid for by the juvenile, as determined under the provisions of N.J.A.C. 13:91-3.7.

...

13:91-2.1 Transfer criteria; transfer hearing

[(a) A juvenile who has reached the age of 21 may be transferred to the Department, only when the Superintendent, Secure Care Administrator, and Executive Director have approved a determination of the JRCC that the threshold criteria set forth in (c) below have been satisfied.]

[(b)]* ***[a] A juvenile who has reached the age of 18*[, but who has not reached the age of 21]* may be transferred to the Department, only when the Superintendent, Secure Care Administrator, and Executive Director have approved a determination of the JRCC that the threshold criteria set forth in ***[(c)]* ***[b]*** below have been satisfied and:****

1.-2. (No change from proposal.)

[(c)]* ***[b] The threshold criteria for transfer of a juvenile to the Department are ***[that the juvenile]*:****

1. ***[Demonstrates]* ***The juvenile demonstrates*** disruptive behavior, and that his or her continued presence in the juvenile facility threatens:**

i.-ii. (No change from proposal.)

2.-3. (No change from proposal.)

13:91-2.2 JRCC recommendation; administrative reviews

(a) When the JRCC determines that the threshold requirements of N.J.A.C. 13:91-2.1***[(c)]* ***[b]***** have been satisfied, the chair of the JRCC shall complete a Form 101, recommending transfer of the juvenile to the Department, and shall submit the form, along with a copy of a classification summary, progress notes, and a narrative report describing the reasons for the transfer request, to the Superintendent.

(b)-(d) (No change from proposal.)

(e) The Executive Director or designee shall approve or disapprove the

recommended transfer by signing Form 101.

[1. With respect to the proposed transfer of a juvenile who has reached the age of 21, if the Executive Director or designee approves the proposed transfer, he or she shall indicate approval on Form 101, and shall then forward the form to the Commissioner, as provided for in N.J.A.C. 13:91-2.3.]

[2.] *1.* *[With respect to the proposed transfer of a juvenile who has reached the age of 18, but who has not reached the age of 21, if]* *If* the Executive Director or designee approves the proposed transfer, he or she shall indicate approval on Form 101, and then return the form through the Secure Administrator to the Superintendent for the scheduling of a hearing under the provisions of N.J.A.C. 13:91-3, unless the juvenile agrees to the transfer and requests a transfer without a hearing by signing the Voluntary Transfer Request Form, Form 103.

[3.] *2.* (No change in text from proposal.)

13:91-2.3 Forwarding of recommendation to Commissioner; Commissioner action

(a) The Executive Director or designee shall transmit Form 101 to the Commissioner together with a formal *[a]* request to transfer a juvenile to the Department:

[1. Upon the Executive Director's approval of the transfer of a juvenile who has reached the age of 21, under the provisions of N.J.A.C. 13:91-2.1(f)1;]

[2.] *1.* Upon receiving the written determination provided for in N.J.A.C. 13:91-3.14 that the hearing officer has approved the transfer of a juvenile *[who has reached the age of 18 but who has not reached the age of 21]*; or

[3.] *2.* (No change in text from proposal.)

(b)-(c) (No change from proposal.)

13:91-3.1 Applicability

The requirement for a transfer hearing and the provisions of this subchapter shall apply to *[the]* *all* proposed transfer*s* of a juvenile *[who has reached the age of 18, but who has not reached the age of 21]*.

13:91-3.2 Designation and authority of the hearing officer

(a) All hearings on proposed transfers of juveniles to the Department shall be conducted at a secure facility by a hearing officer designated by the *[Executive Director]* *Attorney General or designee*.

(b)-(c) (No change from proposal.)

13:91-3.3 Service of JRCC determination; segregation of the juvenile

(a) Form 101 and accompanying narrative reports shall be served upon the juvenile by the Superintendent or designee within 24 hours of the Executive Director's approval under N.J.A.C. 13:91-*[2.2(f)]**2.2(c)*, shall be signed by the person delivering it, and the date and time of delivery shall be noted. The juvenile shall have at least *[48]* *96* hours to prepare his or her objections to the

transfer, and may request additional time to prepare by requesting a postponement under the provisions of N.J.A.C. 13:91-3.5(c).

1. At the time Form 101 and accompanying narrative reports are served on the juvenile, the juvenile shall be informed in writing and verbally of his or her right to retain counsel, as is provided for in N.J.A.C. 13:91-3.7.
(b) (No change from proposal.)

13:91-3.5 Scheduling transfer hearings

(a) (No change from proposal.)

(b) The juvenile shall be entitled to a hearing within ~~*[three]*~~ ***six*** days of being served with Form 101, including weekends and legal holidays, unless the hearing is prevented by exceptional circumstances, unavoidable delays, or reasonable postponements. Should the ~~*[third]*~~ ***sixth*** day fall on a Saturday, Sunday, or legal holiday, the last day for the hearing shall be the weekday immediately following the weekend or legal holiday.

(c) A request for one postponement of up to one week shall be granted if a request is communicated to the office of the Superintendent at any time prior to the hearing time scheduled under (a) above by either the juvenile or the ~~*[Ombudsman representing the juvenile under the provisions of N.J.A.C. 13:91-3.7]*~~ ***juvenile's representative***.

(d) A request for a postponement made by a juvenile may be directed to any facility staff member, who shall immediately forward the request to the Office of the Superintendent. A request for a postponement made by the ~~*[Ombudsman]*~~ ***juvenile's representative*** shall be submitted by fax or by email.

(e) (No change from proposal.)

13:91-3.7 Representation ~~*[by Ombudsman]*~~; interested party statements

(a) ~~*[The Ombudsman shall represent the]*~~ ***A*** juvenile **shall be represented** at ~~*[all]*~~ ***a*** transfer hearing~~*[s]*~~, including at an in absentia hearing held under the provisions of N.J.A.C. 13:91-3.9*, **either by the Ombudsman or by private counsel, selected, retained, and paid for by the juvenile***.

1. The juvenile shall have 48 hours from the time of receiving notice of the proposed transfer, under the provisions of N.J.A.C. 13:91-3.3, to choose representation by either the Ombudsman or by private counsel.

~~*[1.]*~~ ***2.*** The ~~*[Ombudsman]*~~ ***juvenile's representative*** shall be permitted reasonable time to speak to the juvenile and shall be given at least 48 hours to prepare a challenge to the proposed transfer, and may request additional time to prepare by requesting a postponement with the consent of the juvenile under the provisions of N.J.A.C. 13:91-3.5(c).

~~*[2.]*~~ ***3.*** An interested party, as defined in N.J.A.C. 13:91-1.3, may submit a written statement ~~*[to the Ombudsman in support of the juvenile's case either by mail or by fax, provided that it shall be up to the discretion of the Ombudsman whether the written statement bears sufficiently on the merits of the proposed transfer to warrant being presented]*~~ for consideration by the hearing officer ***by mail or by fax***.

(b)-(c) (No change from proposal.)

13:91-3.10 Opportunity to call witnesses and present evidence

(a)-(c) (No change from proposal.)

(d) The hearing officer, the juvenile, and the *[Ombudsman]* **juvenile's representative** may question witnesses called at the request of the juvenile. The Juvenile or the *[Ombudsman]* **juvenile's representative** may request that specific questions be directed by the hearing officer to a witness. The hearing officer may take testimony in any manner or form necessary to protect facility safety. Such manner or form shall include, but shall not be limited to, the consideration of confidential reports.

1. (No change from proposal.)

13:91-3.12 *[Standard]* **Hearing officer recommendation; standard** for *[approval of transfer]* **recommendation and written findings***

(a) At the conclusion of the hearing, the hearing officer shall prepare written findings and a recommendation whether the proposed transfer should proceed.

(a) **1.** A proposed transfer shall be *[approved]* **recommended** by the hearing officer only upon **comprehensive and detailed findings, signed by the hearing officer and supported by** substantial credible evidence that one or more of the threshold standards set forth in N.J.A.C. 13:91-2.1(c)* **2.1(b)** have been satisfied.

(b) **i.** Evidence relied upon in making *[a determination]* **the recommendation** shall be *[specified in writing]* **clearly set forth in the written findings, which findings shall be attached to and made part of** *[on]* the Transfer Hearing Form, Form 102.

(c) Where the juvenile has assaulted a staff member or another juvenile and that assault has been reported to a law enforcement agency, there shall be a presumption that the transfer is appropriate and the juvenile shall be required to show why the transfer should not occur.]

13:91-3.13 *[Hearing determination, referral]* **Referral** to Executive Director*[,] **for final agency action** and notice to juvenile

(a) Within *[24]* **48** hours after the hearing has been completed, the hearing officer shall *[make a written determination on the Transfer Hearing Form, Form 102, either approving or rejecting the proposed transfer, which determination shall include a description of the facts, evidence relied upon, and the reasons for the decision.]* **submit his or her recommendation and findings, including the Transfer Hearing Form, Form 102, to the Executive Director.**

(b) Within 48 hours of receipt of the hearing officer's recommendation and findings, the Executive Director shall issue a written determination whether the juvenile shall be referred for transfer to the Department, which determination shall constitute final agency action.*

(b) **1.** *[The Transfer Hearing Form, Form 102, and all supporting documentation, shall immediately be forwarded to the Executive Director or designee, and copies]* **Copies of the hearing officer's recommendation and**

Executive Director's determination* shall be given to the juvenile and forwarded to the Superintendent and Secure Care Administrator.